Sejati Education Sdn Bhd v S3M Development (Sabah) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1282–08 OF 2014
BALIA YUSOF, HAMID SULTAN AND BADARIAH SAHAMID JJCA
26 NOVEMBER 2015

Contract — Specific performance — Agreement — Sale and purchase agreement — Agreement contained 'option to purchase' clause — Option exercised before expiry date — Parties already in progress to settle sale and purchase terms outside option period — Whether purchase of property must be concluded within option period notwithstanding no objection by other party to option notice

The appellant ('the plaintiff') appealed against the decision of the High Court in dismissing the action for specific performance of sale of a property pursuant to 'an option to purchase' clause in a tenancy agreement between the plaintiff as the tenant and the respondent ('the defendant') as the owner of the property. The defendant had let the property in dispute pursuant to a tenancy agreement with an option to purchase clause. Before the expiry date, the plaintiff exercised the option. About a month later, the plaintiff sent a draft sale and purchase agreement ('SPA') and the defendant's director met the plaintiff in respect of the SPA. Subsequently, the defendant's managing director emailed a new SPA. The option was exercised by the plaintiff within the stipulated period but at the High Court, the trial judge took the view that the purchase of the property must be concluded within the option period notwithstanding there was no objection by the defendant to the option notice and in fact parties were already in progress to settle the sale and purchase terms outside the option period.

Held, allowing the appeal with costs of RM5,000:

(1) The order of the High Court was set aside. Specific performance of the purchase of the property was decreed. The matter was remitted to the senior assistant registrar ('the SAR') to enable the parties to settle the terms and/or for the appropriate orders and/or directions to be made by the SAR to ensure that the said property was conveyed to the appellant upon receipt of the purchase price (see para 12).

(2) The defendant had taken no objection to the plaintiff's exercise of the option, in consequence, there could not be any issue whether the SPA must be completed within the option period. By the subsequent conduct of the parties in exchanging the SPA, it was a clear indicator that by conduct, the parties gave a meaning to the time frame as to when the SPA must be concluded. It could be outside the option period provided the

option was exercised within the stipulated time. The trial judge erred in law which resulted in a miscarriage of justice (see para 7).

(3) The plaintiff must be willing and ready to purchase the property within the time frame allowed in conveyancing practice if time had not been agreed and the defendant must deliver the property free from encumbrance. The SPA was quite clear that the terms stipulated were standard terms and if there were variations to standard terms, it was the obligation of the vendor to deliver a standard sale and purchase terms for the execution of the purchaser. The vendor had failed to do so. The plaintiff was ready and willing to purchase the property, the price had been agreed, the land had been clearly identified and the court was obliged to order specific performance of the contract (see paras 9–11).

[Bahasa Malaysia summary

Perayu ('plaintif') merayu terhadap keputusan Mahkamah Tinggi dalam menolak tindakan bagi pelaksanaan spesifik jualan hartanah berikutan kepada klausa 'an option to purchase' dalam perjanjian penyewaan di antara plaintif sebagai penyewa dan responden ('defendan') sebagai pemilik hartanah tersebut. Defendan telah membenarkan hartanah yang dipertikaikan berikutan kepada perjanjian penyewaan dengan opsyen kepada klausa pembelian. Sebelum tarikh tamat, plaintif melaksanakan opsyen tersebut. Lebih kurang sebulan kemudian, plaintif menghantar draf perjanjian jual beli ('PJB') dan pengarah defendan bertemu dengan plaintif berkaitan PJB tersebut. Kemudiannya pengarah urusan defendan emel PJB baru. Opsyen tersebut dilaksanakan oleh plaintif dalam tempoh masa yang ditetapkan tetapi di Mahkamah Tinggi, hakim bicara berpendapat bahawa pembelian hartanah tersebut mesti diputuskan dalam tempoh opsyen tersebut meskipun tidak terdapat bantahan oleh defendan kepada notis opsyen tersebut dan sebenarnya pihak-pihak telah sedang dalam menyelesaikan terma jual beli di luar tempoh opsyen tersebut.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM5,000:

(1) Perintah Mahkamah Tinggi dibatalkan. Pelaksanaan spesifik pembelian hartanah telah didekrikan. Perkara diremit kepada timbalan kanan pendaftar ('TKP') untuk membolehkan pihak-pihak menyelesaikan terma-terma dan/atau bagi perintah-perintah wajar dan/atau arahan-arahan dibuat oleh TKP untuk memastikan bahawa hartanah tersebut diberikan kepada perayu atas penerimaan harga pembelian (lihat perenggan 12).

(2) Defendan tidak membantah kepada pelaksanaan opsyen oleh plaintif, akibatnya, tidak boleh terdapat apa-apa isu sama ada PJB mesti diselesaikan dalam tempoh opsyen tersebut. Atas tingkah laku pihak-pihak berikutnya dalam menukar PJB tersebut, ia adalah

penunjuk yang jelas bahawa melalui tindakan, pihak-pihak memberi maksud kepada masa terhadap bila PJB mesti diputuskan. Ia boleh menjadi di luar tempoh opsyen dengan syarat opsyen tersebut dilaksanakan dalam masa yang ditetapkan. Hakim bicara tersilap dari segi undang-undang yang mengakibatkan ketidakadilan (lihat perenggan 7).

(3) Plaintif mesti sanggup dan bersedia untuk membeli hartanah dalam masa yang dibenarkan dalam amalan pemindahhakkan jika masa tidak dipersetujui dan defendan mesti menyerahkan hartanah bebas daripada halangan. PJB tersebut adalah agak jelas bahawa terma-terma yang ditetapkan adalah terma-terma standard, adalah tanggunjawab penjual untuk memberikan terma jual beli yang standard bagi penyempurnaan pembeli. Penjual gagal berbuat sedemikian. Plaintif bersedia dan sanggup untuk membeli hartanah, harga telah dipersetujui, tanah telah jelas dikenal pasti dan mahkamah adalah wajib untuk memerintahkan pelaksanaan spesifik kontrak (lihat perenggan 9–11).]

Notes

For cases on specific performance in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6902–6918.

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Hillas & Co Ltd v Arcos Ltd [1932] All ER Rep 494, HL (refd)
Liverpool City Council v Irwin [1977] AC 239, HL (refd)
Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors [2005] 2 MLJ 32, CA (refd)
Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai [1986] 3 SCC 300, SC (refd)

Appeal from: Suit No KK-22–137 of 2011 (High Court, Kota Kinabalu)

Terrance Lee (Lam & Co) for the appellant.
Sugumar Balakrishnan (Sugumar & Co) for the respondent.

Hamid Sultan JCA:

[1] The appellant/plaintiff appeals against the decision of the learned High Court judge who had dismissed the action for specific performance of sale of a property pursuant to 'an option to purchase' clause in a tenancy agreement between the plaintiff as the tenant and the respondent/defendant as the owner of the property.

[2] In the instant case, the option was exercised by the plaintiff within the

stipulated period but the learned trial judge took the view that the purchase of the property must be concluded within the option period notwithstanding there was no objection by the defendant to the option notice and in fact parties were already in progress to settle the sale and purchase terms outside the option period.

[3] The memorandum of appeal, inter alia, reads as follows:

> (2) That the learned Judge erred in law in failing to apply *United Overseas Bank (malaysia) Bhd v Ocean Avenue Sdn Bhd* [2008] 6 CLJ 66 to hold that the Option to Purchase under clause 6.1.3 is a term and condition of a tenancy agreement. It is part and parcel of a valid agreement. The option granted is a valid option which upon the exercise thereof constitute a contract for the sale of the demised premises.
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> (3) The learned Judge erred in law in not applying the rationale given by Megarry J *Brown v Gould and Others* [1972] 1 Ch 53 at p 58: 'Under an option, only one step is normally needed to constitute a contract, namely, the exercise of the option'.
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> (4) That the learned Judge erred in law to hold that the exercise of the Option must be concluded within 2 years of the Tenancy Agreement i.e. '6.1.3 That the Tenant be given the Option to purchase the Demised Premises during the subsistence of the first two (2) years tenancy period at the agreed purchase price of Ringgit Malaysia Five Million (RM5,000,000.00)'.

JURISPRUDENCE

[4] After having read the judgment of the High Court and the submissions of the learned counsel we realised the relevant authorities and jurisprudence relating to option to purchase was not canvassed by the counsel here or at the court below for the learned trial judge to make an informed decision based on the law.

[5] When the court deals with the interpretation of option to purchase clause and its enforceability, it needs to meticulously observe with some trite principles relating to this area of jurisprudence, and on the facts of this case the court must not lose sight of what was stated in the case of *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors* [2005] 2 MLJ 32, where the facts are similar to the instant case. It is now well settled that:

(a) the law leans in favour of upholding bargains and not in striking them down (see *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494; [1932] All ER 494; *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327;

(b) an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto. However, the parties may by subsequent conduct give a term in an agreement a particular meaning; and

(c) even if the 'option clause' is subject to the conclusion of a sale and purchase agreement and the usual terms have been agreed or could be implied as per the conveyancing practice such as the parties, price and the vendor must deliver the property free from encumbrance, etc. which are considered to be essential terms of the contract, the court will move towards its enforcement. If necessary, in order to give effect to the contract, the law will, acting out of necessity, imply terms into the contract for sale in order to make it work (see *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; *Liverpool City Council v Irwin* [1977] AC 239; *Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300.

BRIEF FACTS

[6] The defendant had let the property in dispute pursuant to a tenancy agreement dated 1 February 2008 with an option to purchase clause. The relevant clauses in the tenancy agreement are cll 6.1.3, 6.1.4 and 17.1 which read as follows:

> 6.1.3 That the Tenant be given the Option to purchase the Demised Premises during the subsistence of the first two (2) years tenancy period at the agreed purchase price of Ringgit Malaysia Five Million (RM5,000,000.00).
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> 6.1.4 If after Two (2) years of the tenancy period, the tenant not keen to exercise his option to purchase granted under clause 6.13 hereof, the Landlord shall be at liberty to sell to any third party who shall be bound to continue the term of this tenancy with the tenant on the same terms and conditions as stated herein.
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> 17.1 Time whenever mentioned shall be of the essence of this Agreement.

[7] It is not in dispute that the option date expired on 31 January 2010 and before the expiry date the plaintiff by a letter dated 28 January 2010 had exercised the option. About a month later, the plaintiff's solicitors had sent a draft sale and purchase agreement on 11 March 2010 and on 16 March 2010 the defendant's director had met the plaintiff's solicitors in respect of the sale and purchase agreement. Subsequently, on 26 March 2010 the defendant's managing director had emailed a new sale and purchase agreement. What is important to note here is that the defendant had taken no objection to the plaintiff's exercise of the option, in consequence, there cannot be any issue whether the sale and purchase agreement must be completed within the option period. Here, by the subsequent conduct of the parties in exchanging the sale and purchase agreement, it is a clear indicator that by conduct, the parties have given a meaning to the time frame as to when the sale and purchase agreement must be concluded. That is to say, it can be outside the option period provided the option is exercised within the stipulated time. In this respect, the learned trial judge had erred in law which had resulted in a miscarriage of justice on the face of the record.

[8] In *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors*, the vendor ('the respondents') of certain immovable property had granted an option to purchase to the intended purchaser ('the appellants'). The issue pertained to the construction of cl 2 of the option. Clause 2 provided that the intended purchasers agree to enter a sale and purchase agreement within 45 days of date hereof and to pay the balance sum amounting to a total of 10% of the total purchase price if they decided to exercise the option to purchase the properties. The balance of the 10% was not paid within the 45 days specified in cl 2. However, the appellants did, within the 45 days specified in the option, forward to the respondents' solicitors a draft agreement. At no time throughout the material period when the parties were in communication with each other did the respondents reject the transaction out of hand on the ground that the appellants had not paid the balance of the 10% deposit within the 45 days limited by cl 2. Instead, the respondents' solicitors in its letter dated 12 July 1993 replied that they have no objections to the terms of the draft agreement prepared by the appellants' solicitors and sent by them under the cover of their letter dated 17 April 1993. Gopal Sri Ram JCA (as he then was) in the case dealing with similar issues and prayers had this to say:

> 2. It is the appellants' case that the aforesaid clause on its true construction means that the sale and purchase agreement contemplated by the clause must be executed and the balance of the 10% deposit referred to therein be paid at the time of such execution. There is no dispute that the balance of the 10% was not paid within the 45 days specified in cl 2. However, according to the chronology of events we were taken through, it is equally beyond challenge that the appellants did, within the 45 days specified in the option, forward to the respondents' solicitors a draft agreement containing terms that may be found in any normal sale and purchase agreement in Malaysian conveyancing practice.
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> 3. It is also a point of considerable significance that at no time throughout the material period when the parties were in communication with each other did the respondents reject the transaction out of hand on the ground that the appellants had not paid the balance of the 10% deposit within the 45 days limited by cl 2. Instead, we find in the record of appeal provided to us a letter from the respondents' solicitors dated 12 July 1993 in which they say that they have no objections to the terms of the draft agreement prepared by the appellants' solicitors and sent by them under cover of their letter dated 17 April 1993. Now, this was well outside the 45-day period specified in cl 2. That period expired on 23 February 1993.
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> 4. We therefore have here a situation whereby the parties have by their contemporaneous conduct subsequent to the making of the option agreement have placed an interpretation on cl 2 of exh P2 to the effect that payment of the balance of the 10% was not to be made within the 45 days prescribed by that clause. Is it then open to a court to place a different interpretation on cl 2? With respect, we think not.
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> 5. We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Machine Tools Sales v L Schuler AG* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning.

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See *American Surety Co of New York v Calgary Mining Co Ltd* (1919) 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce Bank* [1982] 1 QB 84 *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

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6. In our respectful view, this is the error into which the learned judge in the court below fell. Instead of hearkening to the way in which the parties themselves acted towards each other in relation to the meaning of cl 2, he erred in accepting the invitation of the defendants' (respondents before us) counsel to place a different interpretation on the said clause. It follows from what we have said thus far that there was a concluded and binding agreement between the parties in terms of the draft agreement sent under cover of the appellants' solicitors' letter dated 17 April 1993. This is accordingly a case which demands appellate interference.

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7. For the reasons already given, this appeal succeeds and is accordingly allowed. The orders of the High Court are set aside. Specific performance in terms of the draft agreement enclosed with the appellants' solicitors' letter dated 17 April 1993 is hereby decreed. The matter is remitted to the senior assistant registrar of the High Court to enable the parties to settle the terms of the minutes of the order that is to carry into execution the decree hereby granted. The appellants shall have the costs of this appeal and those incurred in the court below. The deposit is refunded to the appellant.

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[9] The next issue is the dispute relating to the terms of the sale and purchase agreement. Both the learned counsel had submitted in length on the issue of the sale and purchase agreement without appreciating elementary principles in conveyancing practice. That is to say, the plaintiff must be willing and ready to purchase the property within the time frame allowed in conveyancing practice if time has not been agreed and the defendant must deliver the property free from encumbrance. Learned authors *Janab's Key To Practical Conveyancing and Islamic Banking* (2nd Ed, 2013) on this practice had this to say:

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In any conveyancing transaction of land in Malaysia, the solicitors must ensure that the obligations of the vendor and purchaser are clearly spelt out in the sale and purchase agreement and in addition they have to stipulate the mechanism to fulfill such obligations. For example, the vendor is obliged to give good title to the land; transfer and give vacant possession of the property within the time specified in the contract; and perform all other obligations incidental to the transfer within the specified time. The purchaser is obliged to pay the purchase price within the specified time; accept the transfer free from encumbrance; and performs all other obligations incidental to the transfer within the specified time.

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[10] We have looked at the sale and purchase agreement of the plaintiff and subsequent correspondence. It is quite clear that the terms stipulated are standard terms and if there are variations to standard terms, it is the obligation

of the vendor to deliver a standard sale and purchase terms for the execution of the purchaser. In the instant case, we note the vendor had failed to do so.

[11] In the instant case, we note that the plaintiff is ready and willing to purchase the property, the price had been agreed, the land had been clearly identified and the court is obliged to order specific performance of the contract based on the jurisprudence advocated earlier and as was done in the case of*Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors.*

[12] For reasons stated above, the appeal is allowed with costs of RM5,000 and the order of the High Court is set aside. Specific performance of the purchase of the property is decreed. The matter is remitted to the senior assistant registrar of the High Court to enable the parties to settle the terms and/or for the appropriate orders and/or directions to be made by the senior assistant registrar to ensure that the said property is conveyed to the appellant upon receipt of the purchase price.

Appeal allowed with costs of RM5,000.

Reported by Afiq Mohamad